SK B&T Pte Ltd v The owners of the ship or vessel 'Silver Moon' of Port Klang (No 2)

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO WA-27NCC-14–02 OF 2016
AZIZAH NAWAWI J
29 NOVEMBER 2016

Civil Procedure — Admiralty — Order for sale of ship — Court granted warrant of arrest in favour of plaintiff against defendant's vessel — Defendant failed to provide security deposit — Plaintiff filed application pursuant to O 70 r 20 of the Rules of Court 2012 for vessel and bunkers to be sold by private treaty — Whether there were good reasons and fair grounds for sale pendente lite to be granted

Shipping and Navigation — Action in rem — Sale of vessel — Court granted warrant of arrest in favour of plaintiff against defendant's vessel — Defendant failed to provide security deposit — Plaintiff filed application pursuant to O 70 r 20 of the Rules of Court 2012 for vessel and bunkers to be sold by private treaty — Whether there were good reasons and fair grounds for sale pendente lite to be granted — Rules of Court 2012 O 70 r 20

The plaintiff and the defendant had entered into a time charter party ('the TCP') on 8 January 2016 in which the defendant agreed to time charter its vessel known as 'SILVER MOON' ('the vessel') to the plaintiff. Nevertheless, due to the vessel being unseaworthy and still being off-hire by the defendant for more than seven days, the plaintiff terminated the TCP. Due to the failure of the defendant to provide security in the sum of USD2m, the plaintiff applied for warrant of arrest against the vessel which was granted by the court. Subsequently, the plaintiff issued a demand for security for the release of the vessel but the defendant failed to provide the security and the vessel continued to be under arrest by the court. Consequently, on 29 March 2016, the plaintiff filed the present application pursuant to O 70 r 20 of the Rules of Court 2012 ('the ROC') for the vessel and bunkers to be sold by private treaty ('encl 33'). In support of its application, the plaintiff asserted that: (a) the estimated cost of monthly maintenance was RM35,000; (b) the plaintiff had already been invoiced of the cost of USD8,343; (c) the vessel was being exposed to the elements of sea and weather and would quickly deteriorate physically; (d) the current value of the vessel was only about USD100,000–USD300,000; (e) the current ship market was extremely volatile and cause market value of vessels to continue to plunge; (f) the arbitration proceedings would take about 18–24 months; and (g) there was caveat against release and there could be other

potential claim against the vessel which would reduce the pool of proceed available for distribution to all claimants ('the factors'). On the other hand, the defendant submitted that pursuant to O 70 r 20(11) of the ROC, an application for sale of vessel can only take place in an instant of default.

Held, allowing encl 33 with costs:

(1) Based on the factors relied by the plaintiff and that since the defendant had failed to offer any suitable security for the release of the vessel, this was a proper case with good reasons and fair grounds for an order for sale *pendente lite* to be granted (see para 26).

(2) With regards to the defendant's contention that an application for sale of a vessel can only take place in an instant of default, such as in default of appearance or defence, the case of *The Myrto* [1978] 1 Lloyd's Rep 11 established the principle that the order can and was granted in a defended action (see para 28).

[Bahasa Malaysia summary

Pihak plaintif dan defendan telah membuat perjanjian carter masa ('PCM') pada 8 Januari 2016 bahawa defendan bersetuju untuk carter masa kapalnya dikenali sebagai 'SILVER MOON' ('kapal') kepada plaintif. Walau bagaimanapun, oleh sebab kapal itu tidak layak untuk belayar dan masih dibaiki (*off-hire*) oleh defendan untuk lebih daripada tujuh hari, pihak plaintif telah menamatkan PCM itu. Oleh sebab defendan gagal untuk menyediakan cagaran berjumlah USD2 juta, pihak plaintif telah memohon suatu waran menahan ke atas kapal itu yang telah dibenarkan oleh mahkamah. Selanjutnya, pihak plaintif telah mengeluarkan tuntutan cagaran untuk pelepasan kapal itu tetapi defendan telah gagal untuk menyediakan cagaran dan kapal itu terus berada di bawah tahanan mahkamah. Seterusnya, pada 29 Mac 2016, pihak plaintif telah memfailkan permohonan ini menurut A 70 k 20 Kaedah-Kaedah Mahkamah 2012 ('KKM') supaya kapal dan bunker dijual melalui perjanjian persendirian ('lampiran 33'). Bagi menyokong permohonannya, pihak plaintif menyatakan bahawa: (a) anggaran kos penyenggaraan bulanan ialah sebanyak RM35,000; (b) pihak plaintif telah pun diberi invois bagi kos berjumlah USD8,343; (c) kapal itu telah terdedah kepada elemen laut dan cuaca dan akan merosot secara fizikal dengan cepat; (d) nilai semasa kapal itu hanyalah lebih kurang USD100,000–USD300,000; (e) pasaran semasa kapal terlalu tidak menentu dan menyebabkan nilai kapal terus jatuh; (f) prosiding timbang tara akan mengambil masa 18–24 bulan; dan (g) terdapat kaveat daripada pelepasan dan terdapat kemungkinan apa-apa tuntutan berpotensi yang lain terhadap kapal itu yang akan mengurangkan keuntungan yang ada untuk dibahagikan kepada semua penuntut ('faktor-faktor'). Sebaliknya, pihak defendan menghujahkan bahawa menurut A 70 k 20(11) KKM, suatu permohonan menjual kapal hanya boleh berlaku sekiranya berlaku keingkaran.

Diputuskan, membenarkan lampiran 33 dengan kos:

(1) Berdasarkan faktor-faktor yang disandarkan oleh plaintif dan oleh sebab defendan telah gagal untuk menawarkan apa-apa cagaran bagi pelepasan kapal itu, ini merupakan kes yang munasabah yang mempunyai sebab yang adil bagi suatu perintah jualan *pendente lite* dibenarkan (lihat perenggan 26).

(2) Berhubung dengan hujahan defendan bahawa suatu permohonan menjual kapal hanya boleh berlaku sekiranya berlaku keingkaran, sebagai contoh keingkaran kehadiran atau pembelaan, kes *The Myrto* [1978] 1 Lloyd's Rep 11 telah menetapkan prinsip bahawa perintah itu boleh dan telah dibenarkan dalam tindakan yang dibela (lihat perenggan 28).]

Notes

For a case on order for sale of ship, see 2(1) *Mallal's Digest* (5th Ed, 2015) para 367.

For cases on sale of vessel, see 11(1) *Mallal's Digest* (5th Ed, 2015) paras 1216–1220.

Cases referred to

Lai Lai Yin v MV 'YIH SHEN', owners of and other persons interested [1986] 2 MLJ 65; [1985] 1 LNS 121 (refd)

Myrto, The [1978] 1 Lloyd's Rep 11, CA (refd)

Timberail Sdn Bhd v The owner and/or other persons interested in the vessel 'SAN YANG 2' [1998] 6 MLJ 434, HC (refd)

Legislation referred to

Arbitration Act 2005 s 11
Courts of Judicature Act 1964 s 24(b)
Rules of Court 2012 O 70 r 20, 20(11)
Senior Courts Act 1981 [UK] ss 20(2)(h), 21(4)

J Joseph (Joseph & Partners) for the plaintiff.
S Ramesh (Rastam Singh & Co) for the defendant.

Azizah Nawawi J:

APPLICATION

[1] Enclosure (33) is an application filed by the plaintiff under O 70 r 20 of the Rules of Court 2012 for, inter alia, the following orders:

(a) that the vessel, 'SILVER MOON' (IMO No 8912675) of Port Klang and the bunkers, fuel, lubricants and other consumables, if any, be appraised and sold by the sheriff by private treaty (open tender) in the first instance

A and thereafter, if necessary, by public auction, such sale to be free and clear of any liens, charges and encumbrances; and

(b) that the sum realised from the sale, after deducting the sheriff's commission be paid into court to the credit of these proceedings.

B

[2] The grounds of the application are that the vessel arrested in this action as security for the plaintiff's claim is a 'wasting asset', which is quickly deteriorating physically and depreciating in value as well as incurring further cost and expenses in her maintenance.

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[3] Having considered the application and the submissions of the parties, this court had allowed the plaintiff's application in encl (33) with costs.

THE SALIENT FACTS

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[4] The plaintiff is a company incorporated in Singapore with its registered address at Raffles Place, Republic Plaza, Singapore.

[5] The defendant, Silverline Maritime Sdn Bhd, is the registered owner of
E the vessel, 'SILVER MOON'.

[6] The plaintiff and the defendant has entered into a time charter party on 8 January 2016 (the TCP dated 8 January 2016), whereby the defendant agreed to time charter the vessel to the plaintiff for a period of three months,
F with a further six months in charters option.

[7] The TCP dated 8 January 2016 included an arbitration clause which states as follows:

G Clause 67. Any and all differences and disputes whatsoever nature arising out of this charter *shall be put to arbitration in the city of London* pursuant to laws relating to arbitration there in force ...

[8] The plaintiff had purchased 4000 KL of Marine Gas Oil ('the cargo')
H from a company called Chemoil International Pte Ltd ('Chemoil International') on 12 January 2016 with the intended purpose of shipment on board the vessel, the 'SILVER MOON'.

[9] Upon loading a quantity of 3,942.069 KL Cargo of MGO represented
I by bill of lading No BL-507710-019458 on board the vessel in the Port of Banyan, Singapore, the terminal issued an electronic bill of lading to the order of Chemoil International. The plaintiff paid for the cargo in full and the bill of lading was endorsed to the order of the plaintiff. Hence, the plaintiff is the owner of the cargo on board the vessel.

[10] The plaintiff then gave instructions to the defendant to head to the South Indian Ocean for cargo operations near Male, Maldives.

[11] Despite having received the said instructions from the plaintiff to sail directly to Male, Maldives, the vessel on 8 February 2016 deviated towards a port of refuge, Tanjung Pinang Indonesia and eventually berthed at Johor Port to deal with multiple repair works including but not limited to, oil leakage from the cargo tanks specifically tanks 4S and 5S, seawater ingress to the cargo tank 6P (and other tanks yet to be identified), failure of the vessel's generator, flooded cabin rooms (including the cooks cabin, oiler cabin and AB room) and damage to the vessel's hull owing to the port side lifeboat being in contact with the boat davit ('the defects').

[12] In view of the vessel being unseaworthy and as a result of being off-hire for more than seven days, the plaintiff contends that the defendant were in repudiatory breach of the TCP dated 8 January 2016. As such, the plaintiff issued a letter to the defendant, accepting the repudiatory breach and terminated the TCP dated 8 January 2016 with immediate effect on 15 February 2016.

[13] Vide an email dated 16 February 2016, the plaintiff, through their solicitors Hill Dickinson LLP, reiterating, among others, the termination of the TCP dated 8 January 2016 and demanding security in the sum of USD2m in the form of a bank guarantee.

[14] When the defendant did not provide the security, the plaintiff invoked the admiralty jurisdiction of this court pursuant to s 24(b) of the Courts of Judicature Act 1964 and ss 20(2)(h) and 21(4) of the Senior Courts Act 1981 and by the warrant of arrest, had the vessel arrested.

[15] The writ of summons was filed on 17 February 2016. On an application by the plaintiff, the warrant of arrest was issued against the vessel, 'SILVER MOON' on 17 February 2016.

[16] On 19 February 2016, the plaintiff issued a demand for security to be furnished for the release of the vessel but the defendant/owners failed to provide the security and the vessel continues to be under arrest by this court.

[17] On 29 March 2016, the plaintiff filed this application for the vessel and bunkers to be sold by private treaty.

THE FINDINGS OF THE COURT

[18] Customarily, property that is subject to maritime arrest is released from arrest by way of bail or other form of security. Thus, the bail/security replaces the arrested property and there is no need to go further in terms of sales pending resolution of the claim.

[19] However, where the owners refuse or fail to provide security for release of their vessel the court can order the vessel to be sold *pendente lite* (ie before the hearing of the substantive claim) and the proceeds of sale paid into court and to be paid out to all maritime claimants in order of priority at the conclusion of the case.

[20] It is well established that a court can grant a sale *pendente lite* where no security is provided, based on grounds of *good reason and fairness*. In the landmark decision on point, *The Myrto* [1978] 1 Lloyd's Rep 11 (CA) in deciding that it was an appropriate case for sale *pendente lite*, the court made the following comments:

> On the assumption that the action will remain contested and proceeded to trial, such trial would, unless expedited, be unlikely to come on for about years 1 1/2 years. Even if the trial was expedited, I doubt if it would come on in much less than seven months, that is to say some time after the long vacation this year ... It follows that *the continuing costs of maintenance which have to be considered are costs over a period of at least seven months, during which some costs of maintenance will also have to be incurred if physical deterioration of the ship is to be avoided*.
>
> I accept that the Court should not make an order for the appraisement and sale of a ship pendente lite except for good reason, and this whether the action is defended or not, I accept further that, where the action is defended and the defendants oppose the making of such an order, the Court should examine more critically than it would normally do in a default action the question whether good reason exists or not.
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> I do not accept, however, the contention put forward for the owners, that the circumstance that, unless a sale is ordered and *continuing costs of maintaining the arrest will be incurred over a long period, with consequent substantial dimunition in the value of the plaintiffs' security for their claim*, cannot, as a matter of law, constitute a good reason for ordering a sale. On the contrary, I am of the opinion that it can and often will do so.
>
> ...
>
> It would, in my view, *be unreasonable to keep the ship under arrest at great expense for seven months or more, with the result that, if the bank succeeded in their claim, the amount of their recovery would be reduced by the costs incurred*. (Emphasis added.)

[21] Therefore, the court in 'The Myrto' has considered the following factors to establish that there was 'good reason' for sale *pendente lite*:

(a) length of trial;

(b) the daily costs of maintaining the arrest including berth charges, crews' wages, supply of oil bunkers; supply of water; supply of food and other necessaries and insurance;

(c) the maintenance costs incurred to avoid physical deterioration of the ship; and

(d) that consequentially, the plaintiff's security for its claim would be diminished.

[22] The same position was accepted by our court in the case of *Lai Lai Yin v MV 'YIH SHEN', owners of and other persons interested* [1986] 2 MLJ 65; [1985] 1 LNS 121 (HC) where the court granted an order for sale *pendente lite* and held:

> My reasons for granting an order for appraisement and sale of the vessel pendente lite are quite clear. *They are essentially to prevent the vessel from deteriorating which would considerably reduce the price if it was allowed to be floating in the waters of Penang harbour pending the hearing of the main suit*. At the same time the cost of maintenance including wages of the crew would increase day by day. (Emphasis added.)

[23] In *Timberail Sdn Bhd v The owner and/or other persons interested in the vessel 'SAN YANG 2'* [1998] 6 MLJ 434, the court allowed the application for a sale *pendente lite* as the deterioration of the vessel will lead to a diminution in the value of the vessel and the market price would be affected. At the same time, the cost incurred would continue to be incurred for the arrest of the vessel.

[24] On the factual matrix of the present case, the plaintiff asserts the following facts in the plaintiff's affidavit in support affirmed on 29 March 2016:

(a) that the ship managers, Johor Port Bhd have been appointed and the estimated cost of monthly maintenance is RM35,000;

(b) that the plaintiff have already been invoiced of the cost of USD8,343;

(c) that the vessel is being exposed to the elements of sea and weather and will quickly deteriorate physically;

(d) that the current value of the vessel is only about USD100,000–USD300,000;

(e) that the current ship market is extremely volatile and cause market value of vessels to continue to plunge;

(f) that on reference to arbitration, the arbitration proceedings will take about be 18–24 months; and

A (g) that there is a caveat against release filed by HK Marine Pte Ltd on 21 March 2016 and there could be other potential claims against the vessel (which will reduce the pool of proceed available for distribution to all claimants).

B **[25]** In the defendant's affidavit to oppose the plaintiff's application, the defendant did not condescend to any facts to dispute the plaintiff's assertion with regards to the cost of maintaining the vessel, the deterioration factor, the value of the vessel or the length of time for arbitration.

C **[26]** Therefore, I am of the considered opinion that based on the factors above as relied by the plaintiff and that since the defendant has failed to offer any suitable security for the release of the vessel, I find that this is a proper case with good reasons and fair grounds for an order for sale *pendente lite* to be granted.

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[27] However, the defendant submitted this application should be dismissed on the following grounds:

(a) that pursuant to O 70 r 20(11) of the Rules of Court 2012, an
E application for sale of a vessel can only take place in an instant of default, and in the instant case, there was default on part of the defendant; and

(b) that by filing this application, the plaintiff has waived its rights to seek recourse by way of arbitration.

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[28] With regards to the first issue that an application for sale of a vessel can only take place in an instant of default, such as in default of appearance or defence, the case of 'The Myrto' establishes the principle that the order can and was granted in a defended action.

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[29] In *Admiralty Law and Practice* (2nd Ed) by Toh Kian Sing SC, the author opined at p 225:

> A court would only order sale pendente lite were there is a good reason for it. Although the power to order a sale pendente lite is normally exercised where there
H has been a default of appearance or defence, it is not so restricted. However, in a case of defended action in which there is also opposition to the sale by the defendant, a court would examine the circumstances more critically to determine if there is a good cause for ordering sale *pendent lite*.

I **[30]** On the second issue raised by the defendant that by filing this application, the plaintiff has waived its rights to seek recourse by way of arbitration, the plaintiff submits that this application for sale is necessary to ensure that the plaintiff's claim is adequately secured, to the purpose as security for a claim in arbitration under s 11 of the Arbitration Act 2005.

CONCLUSION

[31] Premised on the reasons enumerated above, the plaintiff's application in encl (33) is allowed with costs.

Enclosure 33 allowed with costs.

Reported by Dzulqarnain Ab Fatar